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In the Supreme Court of the United States

OCTOBER TERM, 1994

BAYOU DES FAMILLES DEVELOPMENT CORPORATION, COAST QUALITY CONSTRUCTION CORPORATION, and BETTY JANE PERRIN, WIFE OF/AND RONALD J. ISAAC,

Petitioners

V.

WEST JEFFERSON LEVEE DISTRICT,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

(1) Whether the denial of a § 404 permit constitutes a taking under the Takings Clause of the Fifth Amendment to the United States Constitution where the permitting process continues for at least six and a half years after the denial.

(2) Whether the Tenth Amendment to the United States Constitution and the principles of federalism embodied in the Constitution permit a state agency to act as an agent or instrumentality of the federal government such that the state agency is exonerated from liability where it voluntarily takes private property for public use at the urging of the federal government and where the taking benefits both a federal and a state project.

(3) Whether the fair market value of property with a highest and best use as investment property is a proper measure of just compensation under the Takings Clause of the Fifth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Louisiana are:

1. Coast Quality Construction Corporation[1]

2. Bayou Des Familles Development Corporation[2]

3. Betty Jane Perrin, wife of/and Ronald J. Isaac

4. West Jefferson Levee District

The following filed *amicus curiae* briefs in the Supreme Court of Louisiana:

1. United States of America

2. Jefferson Business Council

3. Harvey Canal Business Council

4. Westbank Council of the Chamber—New Orleans and the River Region

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[1] Coast Quality Construction Corporation is a closely held Louisiana corporation with no parent companies or subsidiaries.

[2] Bayou Des Familles Development Corporation is a closely held Louisiana corporation with no parent company or subsidiaries.

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OPINIONS BELOW

The opinion of the Supreme Court of Louisiana in *West Jefferson Levee District v. Coast Quality Construction Corp.*, including the denial of rehearing and Chief Justice Calogero's opinion dissenting from the denial of rehearing, is reported at 93-1718 (La. 5/23/94), 640 So.2d 128, and is reprinted in Appendix A at page A-1.

The Louisiana Supreme Court reversed the unanimous decision of the Louisiana Fifth Circuit Court of Appeal in *West Jefferson Levee District v. Coast Quality Construction Corp.*, 620 So.2d 319 (La. App. 5th Cir. 1993). The Court of Appeal's opinion is reprinted Appendix B in page A-114.

The Court of Appeal affirmed the decisions of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, in West Jefferson Levee District v. Bayou Des Familles Development Corp., No. 376-286 (Feb. 27, 1992), West Jefferson Levee District v. Coast Quality Construction Corp., No. 384-086 (Feb. 27, 1992), and West Jefferson Levee District v. Betty Jane Perrin, wife/of and Ronald J. Isaac, No. 383-659 (Feb. 27, 1992). The District Trial Court's Reasons for Judgment and judgments are reprinted in Appendix C-F at page A-149.

JURISDICTION

The Supreme Court of Louisiana rendered its opinion in this case on May 23, 1994. The Court denied rehearing, with two out of seven justices dissenting,[3] on August 12, 1994.

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) to review the decision of the Supreme Court of Louisiana, the highest court of Louisiana in which a cecision could be had, on the grounds that the Louisiana Supreme Court's decision denies prtitioners their right to just compensation under the Takings Clause

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[3] Although the Louisiana Supreme Court's order denying rehearing in-

of the Fifth Amendment to the United States Constitution, results in a holding which is inconsistent with the Tenth Amendment to the United States Constitution and the principles of federalism embodied in the Constitution, and conflicts with decisions of this Court and other federal courts on issues of federal constitutional law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Takings Clause of the Fifth Amendment to the United States Constitution provides:

> [N]or shall private property be taken for public use, without just compensation.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United

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footnote 3 continued

dicates that "Calogero, C.J., dissents from denial of rehearing application; would grant rehearing and assigns reasons" and that "Dennis, J., would grant the rehearing," the advance sheet in which West Publishing Company reported the decision and denial of rehearing fails to acknowledge Justice Dennis's dissent. However, the Clerk of the Supreme Court of Louisiana has confirmed to undersigned counsel that Justice Dennis has not withdrawn his dissent, that West omitted the notation of Justice Dennis's dissent in error, and that the opinion as reported in West's hardbound volume will include the notation: "Dennis, J., would grant the rehearing."

> States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Act of Congress authorizing creation of the Jean Lafitte National Historical Park, 16 U.S.C. § 230 et seq., provides in pertinent part:

> The park shall consist of (1) the area of approximately twenty thousand acres generally depicted on the map entitled "Barataria Marsh Unit-Jean Lafitte National Historical Park and Preserve" numbered 90,000B and dated April 1978, which shall be on file and available for public inspection in the office of the National Park Service, Department of the Interior . . . .

Id. § 230(1).

> The Secretary may revise the boundaries of the park protection zone, notwithstanding any other provision of law, to include or exclude properties, but only with the consent of Jefferson Parish.

Id. § 230a(f).

The Water Resources Development Act. 100 Stat. 4082 et seq. (codified at 33 U.S.C. § 2201 et seq.), provides in pertinent part:

SEC. 103. FLOOD CONTROL AND OTHER PURPOSES

(a) Flood Control.—

> (1) General Rule.—The non-Federal interests for a project with costs assigned to flood control (other than a nonstructural project) shall—
>
> (A) pay 5 percent of the cost of the project;
>
> (B) provide all lands, easements, rights-of-way, and dredged material disposal

areas required only for flood control and perform all related necessary relocations; and

(C) provide that portion of the joint costs of lands, easements, rights-of-way, dredged material disposal areas, and relocations which is assigned to flood control.

(2) 25 Percent Minimum Contribution—If the value of the contributions required under paragraph (1) of this subsection is less than 25 percent of the cost of the project assigned to flood control, the non-Federal interest shall pay during construction of the project such additional amounts as are necessary so that the total contribution of the non-Federal interests under this subsection is equal to 25 percent of the cost of the project assigned to flood control.

(3) 50 Percent Maximum.—The non-Federal share under paragraph (1) shall not exceed 50 percent of the cost of the project assigned to flood control. The proceeding sentence does not modify the requirement of paragraph (1)(A) of this subsection.

....

(i) Lands, Easements, Rights-Of-Way, Dredged Material Disposal Areas, and Relocations.—The non-Federal interests for a project to which this section applies shall provide all lands, easements, rights-of-way, and dredged material disposal areas required for the project and perform all necessary relocations, except to the extent limited by any provision of this section. The value of any contribution under the proceeding sentence shall be included in the non-Federal share of the project specified in this section.

(j) Agreement.—

(1) Requirement For Agreement.—Any project to which this section applies (other than

a project for hydroelectric power) shall be initiated only after non-Federal interests have entered into binding agreements with the Secretary to pay 100 percent of the operation, maintenance, and replacement and rehabilitation costs of the project, to pay the non-Federal share of the costs of construction required by this section, and to hold and save the United States free from damages due to the construction or operation and maintenance of the project, except for damages due to the fault or negligence of the United States or its contractors.

100 Stat. 4084, 4086-87 (codified at 33 U.S.C. § 2213).

SEC. 401. AUTHORIZATION OF PROJECTS.

(a) Authorization of Construction.—The following works of improvement for the control of destructive floodwaters are adopted and authorized to be prosecuted by the Secretary substantnially in accordance with the plans and subject to the conditions recommended in the respective reports designated in this subsection, except as otherwise provided in this subsection:

....

WEST BANK HURRICANE PROTECTION LEVEE, JEFFERSON PARISH, LOUISIANA

Structural and nonstructural measures to prevent flood damage to those areas identified in the February 1984 draft environmental impact statement for the West Bank Hurricane Protection Levee, Jefferson Parish, Louisiana, at a total cost of $61,500,000, with an estimated first Federal cost of $40,000,000 and an estimated first non-Federal cost of $21,500,000. Funds provided by non-Federal interests for interim hurricane protection may be considered beneficial expen-

ditures and may be credited as part of the non-Federal contribution of the project pursuant to section 104 of this Act.

100 Stat. 4111, 4128.

STATEMENT OF THE CASE

The petitioners in this case are landowners, Bayou Des Familles Development Corporation ("BDF"), Coast Quality Construction Corporation ("Coast"), and Betty Jane Perrin, wife of/and Ronald J. Issac ("the Isaacs"), whose property has been taken by the joint actions of the respondent, West Jefferson Levee District ("the Levee District"), and the United States Army Corps of Engineers ("the Corps").

As noted by the Louisiana Fifth Circuit Court of Appeal, "the facts are basically undisputed." 620 So.2d at 323 (p. A-118). Petitioners (sometimes referred to as "the landowners") are real estate developers who acquired a tract of land on the west bank of the Mississippi River near New Orleans prior to the adoption of the federal § 404 permitting program. After preparing a plan for development of the property into residential subdivisions, petitioners contracted in 1973 for the construction of a pumping station, a sewage treatment plant, and a levee. The levee was built along an alignment previously proposed by the Corps which placed petitioners' land on the protected side of the levee, thereby enabling the land to be developed.

When the levee was 75% to 90% complete, the Corps issued a cease and desist order to petitioners prohibiting further development of their land without a permit under § 404 of the recently enacted federal Clean Water Act, 33 U.S.C. § 1344, and § 10 of the Rivers and Harbors Appropriations Act, 33 U.S.C. § 403. Petitioners completed their application for after-the-fact permits in 1975, and the Corps was prepared to act on that application by December of that year. However, the Corps deferred action on petitioners' permit, and on November 10, 1978, Congress authorized the creation of Jean Lafitte National Historical

Park, including an 8600-acre "core area" and an 11,400-acre "park protection zone." 16 U.S.C. § 230 et seq. The majority of petitioners' property is located within the park protection zone. On September 21, 1979, the Corps denied petitioners' permit application.

Several months later respondent's predecessor in interest, the Jefferson Parish Council, applied for a permit to build its own locally funded levee along almost the same alignment as petitioners' levee, an alignment the Corps later designated as "Alignment D."[4] The Corps denied the Parish Council's permit application on June 18, 1984, offering instead a permit for construction of a levee along an alternate alignment which would have placed petitioners' property on the unprotected side of the levee. The Corps designated this alternate alignment as "Alternate Alignment Modified E" ("Alignment E").

At that time, the future developability of petitioners' property depended solely on the location of the hurricane protection levee. Although the Corps had denied the Parish Council's application for a permit to construct a levee along the same alignment as petitioners' levee on Alignment D, the Corps could not construct a levee along its preferred alternate alignment, Alignment E, without the Parish Council's cooperation. No party disputes that these were the only two alignments seriously considered, that it was absolutely necessary to construct a levee along one of those alignments for the protection of the public, and that if the levee was constructed along petitioners' original levee alignment, Alignment D, petitioners' property would be both permittable and developable.

The concurrence of two events finally broke the stalemate caused by the Corps' denials of the permits for a levee on Alignment D on the one hand, and the Parish Council's reluctance to accept the Corps' offer of a permit for a levee on Alignment E on the other. First, in 1985, a

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[4] Alignment D varies from the petitioners' alignment only to the extent that it excludes from protection [151] acres later expropriated by the National Park Service.

bill was introduced to the Senate, S.B. 1567, which later became the Water Resources Development Act (WRDA), 100 Stat. 4082 (codified at 33 U.S.C. § 2201 et seq.). The bill specifically authorized the Westbank Hurricane Protection Levee and, most importantly, limited the local share of the cost, including costs for rights-of-way. The importance of federal financial assistance relates to the fact that the Parish Council fully expected that if it accepted the Corps' proposed levee alignment, thereby precluding forever any further development of petitioners' property, then the Parish Council would be liable to petitioners for just compensation as a result of the taking. For this reason, the Parish Council negotiated a Local Cooperation Agreement with the Corps pursuant to Section 103(j) of the WRDA, 33 U.S.C. § 2213(j), which retroactively approved payment by the federal government to the Parish Council for most of the compensation which the Parish Council as well as the Corps anticipated would be awarded to petitioners for this taking.

The second event which helped break the stalemate between the Levee District and the Corps was the assault of Hurricane Juan in the fall of 1985, which caused the flooding of hundreds of homes on the west bank of the Mississippi and sparked public outcry for action on the levee project. Soon thereafter, the Parish Council reluctantly passed a resolution accepting a permit for the construction of a levee along the Corps' proposed alignment (Alignment E) while still requesting a permit for Alignment D. The Parish Council notified the Corps that the Levee District should be the recipient of the permit, and on February 25, 1986, the Corps granted that permit to the Levee District. The Levee District delayed expropriating petitioners' property until it was certain the federal funds would be available.

In 1989, the Levee District filed these expropriation suits against petitioners in the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, seeking rights-of-way for the levee along Alignment

E. The Levee District deposited its estimate of just compensation into the registry of the court based on a valuation of the property as undevelopable wetlands with a nominal value of approximately $550.00 per acre. In their Answers, petitoners demanded "just compensation" based on the fair market value of the property at its highest and best use as a residential subdivision, and petitioners specifically cited the Takings Clause of the Fifth Amendment to the United States Constitution in their Pre-Trial Memorandum.[5] After a consolidated bench trial on the merits, the District Court rendered judgments in favor of petitioners and against the Levee District, awarding petitioners just compensation based on petitioners' experts' appraisals of the property assuming a highesst and best use as residential subdivisions (pp. A-149-79).

On appeal to the Louisiana Fifth Circuit Court of Appeal, the Levee District argued the taking which deprived petitioners of the use of their property was caused by the Corps, not the Levee District. According to the Levee District, the Corps' denial of petitioners' permit application in 1979 completely destroyed the market value of the property by making it unlikely the property would ever be developable into a residential subdivision. Therefore, argued the Levee District, the District Court should have valued the property assuming a highest and best use as undevelopable, recreational wetlands. The Court of Appeal disagreed, holding: "The critical events were the takings by the expropriation proceedings instituted in 1989. The market values were destroyed by that final act. Until then, the real possibility of a change in the landowners favor existed." 620 So.2d at 333 (p. A-143). After amending the District Court's award of delay damages, the Court of Appeal affirmed as amended.

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[5] Petitioners also filed a complaint in the United States Claims Court against the Corps on July 25, 1991. Bayou Des Familles Development Corp., et al v. United States, No. 91-1315L. The Claims Court subsequently stayed the action in that court pending the outcome of this state court litigation.

The Levee District applied to the Supreme Court of Louisiana for a writ of certiorari, which the Court granted on November 19, 1993. 629 So.2d 372 (La. 1993). In an opinion rendered on May 23, 1994, the Louisiana Supreme Court reversed the decision of the Court of Appeal. Noting that "[w]hile the Louisiana Constitution is specifically inapplicable to this expropriation, the United States Constitution still applies." 93-1718 at 14 n.21, 640 So.2d at 1271 n.21 (p. A-24 n.21), the Court nevertheless relied almost exclusively on Louisiana statutes and state jurisprudence to hold petitioners were entitled only to compensation based on the property's value "at its highest and best use as unpermitted wetlands which could be used only for recreational purposes." 93-1718 at 50, 640 So.2d at 1295 (p. A-86).

Whereas the Court of Appeal had found a "real possibility" the property might become legally developable into residential subdivisions in the future, the Louisiana Supreme Court held the Court of Appeal erred as a matter of law in valuing the property based on a highest and best use as residential subdivisions because the landowners had not shown "it was reasonably probable they could have obtained the § 404 and § 10 permits from the Corps in the reasonably foreseable future." 93-1718 at 27, 30, 640 So.2d at 1280, 1282 (pp. A-45, A-51). Therefore, concluded the Court, "the landowners have lost the opportunity to develop their land and generate a return on their investment, not because of any action of the West Jefferson Levee District,...but rather as a result of federal governmental action." 93-1718 at 57 n.54, 640 So.2d at 1299 n.54, (pp. A-97-98n.54).

Petitioners applied to the Louisiana Supreme Court for rehearing. In support of their application,[6] petitioners apprised the Court of the very recent decision of the United States Court of Appeals for the Federal Circuit in *Florida Rock Industries v. United States (Florida Rock IV)*, 18 F.3d 1560 (Fed. Cir. 1994), in which the Federal Circuit ar-

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[6] Supplemental Brief In Support of Application For Rehearing.

ticulated two principles of federal constitutional takings law. First, the Federal Circuit recognized that "[a] speculative market may exist in land that is regulated as well as in land that is not." *Id.* at 1566. Second, the Court recognized the concept of a "compensable 'partial taking.'" *Id.* at 1570. *See also Loveladies Harbor, Inc. v. United States (Loveladies Harbor II)*, 28 F.3d 1171, 1180 (Fed. Cir. 1994). The Louisiana Supreme Court denied petitioners' application for rehearing on August 12, 1994, with Chief Justice Calogero and Justice Dennis dissenting.[7]

In an opinion dissenting from the denial of rehearing, Chief Justice Calogero concluded:

> The Court was led into an erroneous result by accentuating the need on the part of the landowners to prove that a reasonable *probability* existed regarding a prospective use of the property for residential purposes. In my view there was need only for a reasonable *possibility* of such, in order to establish that the property had an investment value beyond that of undevelopable wetlands.

640 So.2d at 1300 (p. A-99) (Calogero, C.J., dissenting from denial of rehearing). Citing the federal constitutional takings law as articulated by the Federal Circuit's decisions in *Florida Rock IV* and *Loveladies Harbor II*, the Chief Justice observed:

> The market value of this property was as an investment, which the *Florida Rock* and *Loveladies Harbor* cases teach us is a relevant and appropriate consideration in valuing expropriated property. This investment potential was not examined in the opinion, nor apparently by the landowners at trial. The "fair market value" of the land in my view is affected by potential uses and should at the least warrant a

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[7] *See supra* note 3.

premium over its wetlands value....

> The just, and constitutional, solution in this case would be to compensate these landowners to the full extent of their loss, given their substantial investment, by having their property valued at a premium over the base wetlands value according to its investment potential at the time just preceding the expropriation.

Id. at 1305 (pp. A-111-12).

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Louisiana ignores and conflicts with decisions of this Court and other federal courts and establishes a precedent under which neither the federal nor state government may be held liable to pay just compensation to landowners to the full extent of their loss where property is taken as a result of joint federal-state regulation. Under state law as interpreted and applied by the Louisiana Supreme Court, petitioners are deprived of just compensation from the Levee District on the grounds that "the Corps did it," while under the Fifth Amendment as interpreted and applied by this court and other federal courts, petitioners would be deprived of just compensation from the Corps on the grounds that "the Levee District did it." As the decision of the Louisiana Supreme Court interprets and applies state law to provide less protection to landowners against uncompensated takings than that afforded by the United States Constitution,[8] that decision is unconstitutional under the Supremacy Clause of Article VI of the United States Constitution, and this Court should grant the petition for certiorari to review it. As stated by this Court in *United States v. Miller,* 317 U.S. 369, 380, 63 S.Ct. 276, 283 (1943),

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[8] The Takings Clause of the Fifth Amendment to the United States Constitution applies to the States through the Fourteenth Amendment. *Dolan v. City of Tigard,* 114 S.Ct. 2309, 2316 (1994).

state laws "do not, and could not, affect questions of substantive right,—such as the measure of compensation,—grounded upon the Constitution of the United States."

The Louisiana Supreme Court erred as a matter of federal constitutional law in three respects. First, the Court's holding that the Corps' denial of petitioners' permit application in 1979 destroyed the value of petitioners' property conflicts with decisions of this Court and other federal courts which hold that the mere denial of a permit is not a taking unless it destroys the economically viable use of the property *and* is final and authoritative. Second, the Court's decision is inconsistent with the Tenth Amendment and the principles of federalism embodied in the Constitution in that it treats the Levee District as a mere agent or instrumentality of the federal government and thereby exonerates the Levee District from liability for payment to petitioners of just compensation to the full extent of their loss as a result of the Levee District's taking. Third, the Court's failure and refusal to consider the value of the property according to its highest and best use as investment property conflicts with the Federal Circuit's recent holding in *Florida Rock v. United States (Florida Rock IV)*, 18 F.3d 1560, 1566 (Fed. Cir. 1994), that "[a] speculative market may exist in land that is regulated as well as in land that is not."

A. The Supreme Court of Louisiana Erred as a Matter of Federal Constitutional Law in Holding the Corps' Denial of Petitioners' Permit Application Destroyed the Value of Petitioners' Property

In holding petitioners' property had been reduced to nominal wetlands value prior to the Levee District's expropriations in 1989 on the grounds that the Corps' denial of petitioners' permit application in 1979 destroyed the value of petitioners' property, 93-1718 at 40, 57 n.54, 640

So.2d at 1288, 1299 n.54 (pp. A-97-98 n.54), the Louisiana Supreme Court erred as a matter of federal constitutional law.

In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127, 106 S.Ct. 455, 459, 88 L.Ed.2d 419 (1985), this Court made it clear that neither the imposition of the Clean Water Act's § 404 permit requirement nor the denial of such a permit necessarily constitutes a taking. "Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question," stated the Court, "can it be said that a taking has occurred." *Id.* Similarly, in *Agins v. Tiburon*, 447 U.S. 255, 263 n.9, 100 S.Ct. 2138, 2143 n.9, 65 L.Ed.2d 240 (1980), the Court stated, "Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense' " (quoting *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 84 L.Ed. 240 (1939)).

An additional prerequisite to assertion of a regulatory takings claim was explained by this Court in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986), as follows:

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.

See also Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2891, 120 L.Ed.2d 798 (1992); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1985);

Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1172 (Fed. Cir.), *cert. denied*, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991) (where "administrative action might have had an effect on whether there was a taking," a taking claim is not ripe); *cf. United States v. Dickinson*, 331 U.S. 745, 749, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 (1947) ("[W]hen the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken' ").

Thus, a landowner alleging that a permit denial effected a taking must show the permit denial (1) prevents economically viable use of the land in question *and* (2) is final and authoritative. Applying these principles of federal constitutional law to the facts surrounding the Corps' 1979 denial of petitioners' permit application as found by the Louisiana Supreme Court, it is clear as a matter of law that the permit denial could not have effected a taking of petitioners' property. Even accepting all of the Louisiana Supreme Court's factual findings as true, there was no *final* determination on the location of the levee at least until the Levee District accepted the permit for a levee on Alignment E in 1986. Until then, there was no way to know "how far" the denial of petitioners' permit would go. *MacDonald*, 477 U.S. at 348.

The Louisiana Supreme Court acknowledges that the permit application process continued long after the Corps' denied petitioners' permit application in 1979. The Court notes that "the Jefferson Parish Council applied for a permit to build its own locally funded hurricane levee on June 19, 1981," and "[i]n February of 1984, the Corps issued a draft EIS [Environmental Impact Statement] in preparation for its decision on the parish's permit application." 93-1718 and 6-7, 640 So.2d at 1267 (pp. A-11, A-12). Even after the Corps denied the Parish Council's permit

application on June 18, 1984, notes the Court, "[t]he Parish Council continued to urge the Corps to accept the compromise alignment or alignment D." *Id.* at 7, 640 So.2d at 1267 (p. A-13). The Court also quotes testimony of petitioners' expert on cross examination which indicates that but for the Levee District's acceptance of the permit for Alignment E, as late as 1989 the Corps would have considered "a different alignment" had petitioners or the Levee District "open[ed] the whole new process" of applying for a permit. 93-1718 at 44, 640 So.2d at 1291 (p. A-74).[9] Clearly, all of this administrative action "might have had an effect on whether there was a taking." *Whitney Benefits,* 926 F.2d at 1172.

Considering these undisputed facts, the Louisiana Supreme Court erred as a matter of law in concluding the Corps' 1979 permit denial destroyed the value of petitioners' property. As both lower state courts found and the Louisiana Supreme Court did not dispute, there continued to be a "real possibility" the Corps would grant a permit for Alignment D. Moreover, prior to the Levee District's acceptance of the permit for construction of a levee along Alignment E in 1986, any claim by the landowners against the Corps alleging the 1979 permit denial had effected a taking would have been met with dismissal on prematurity or ripeness grounds. Yet, while this Court's and other federal courts' interpretation and application of the Fifth Amendment would mandate such a result, the Louisiana Supreme Court relied exclusively on state law to conclude

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[9] The quoted testimony reads:

> Q: Do you feel that in 1989 had, had not the parish not accepted the permit for modified E, that the Corps would have allowed construction of a levee along a different assignment?
>
> A. Not without opening the whole new process.

93-1718 at 44, 640 So.2d at 1291 (p. A-74).

"that the landowners have lost the opportunity to develop their land and generate a return on their investment, not because of any action of the West Jefferson Levee District, ... but rather as a result of federal governmental action." 93-1718 at 57 n.54, 640 So.2d at 1299 n.54 (pp. A-97-98 n.54).

The result of this conflict between the decision of the Louisiana Supreme Court and the decisions of this Court is that petitioners are denied just compensation from the Levee District on the grounds that "the Corps did it," while the Corps will argue in the United States Court of Federal Claims that "the Levee District did it."[10] In light of this conspicuous conflict between the decision of the Louisiana Supreme Court and the decisions of this Court, the Court of Federal Claims is likely to agree with the Corps, leaving the landowners with no compensation at all, much less "just" compensation.

In sum, the Louisiana Supreme Court erred as a matter of federal constitutional law in holding that petitioners' property had been reduced to nominal wetlands value prior to the Levee District's expropriations in 1989 because of the Corps denial of petitioners' permit application in 1979. On the contrary, the Corps' 1979 permit denial could not have effected a taking of petitioners' property because that denial did not become final at least until the Levee District accepted the permit for construction of a levee along Alignment E in 1986. As the Louisiana Supreme Court's decision conflicts with this Court's jurisprudence and deprives petitioners of the protection afforded by the Takings Clause of the Fifth Amendment, this Court should grant the petition for certiorari in order to review that decision.

B. The Supreme Court of Louisiana Erred as a Matter of Federal Constitutional Law in Exonerating the Levee District from Liability Because of the Corps' Regulatory Activities

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[10] *See supra* note 5.

There has never been any question of whether there has been a taking in this case. Rather, the only question is whether it was the federal government or the state government which did the taking. Petitioners consistently alleged and the lower state courts found that the Levee District destroyed the property's value by accepting the Corps' permit for a levee along Alignment E and then expropriating the property for the levee, thereby finally and permanently taking the property out of commerce. In contrast, the Levee District alleged and the Supreme Court of Louisiana found that prior to the expropriations by the Levee District, the Corps destroyed the property's value by denying petitioners' permit application for a levee at Alignment D in order "to preserve the wetlands in the park protection zone as undeveloped wetlands ...." 93-1718 at 40, 640 So.2d at 1288 (p. A-67).

Thus, even though as a matter of federal constitutional law the § 404 permitting process did not itself effect a taking of petitioners' property because that process was not final at least until the Levee District accepted the permit for a levee at Alignment E, the Louisiana Supreme Court exonerates the Levee District from liability for payment of just compensation on the grounds that the Corps in effect commandeered the Levee District into taking action to ensure the property would remain undeveloped wetlands for purposes of the park protection zone. In the words of the Louisiana Supreme Court, petitioners "have lost the opportunity to develop their land and generate a return on their investment, not because of any action of the West Jefferson Levee District, ... but rather as a result of federal governmental action." 93-1718 at 57 n.54, 640 So.2d 1299 n.54 (pp. A-97-98 n.54). This reasoning is inconsistent with the Tenth Amendment to the United States Constitution as interpreted and applied by this Court and other federal courts.

In *New York v. United States,* 112 S.Ct. 2408, 2429 (1992), this Court struck down as an infringement "upon the core of state sovereignty reserved by the Tenth Amend-

ment" a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 which required States to either regulate low-level radioactive waste according to the instructions of Congress, or else "take title to the waste." 42 U.S.C. § 2021e(d)(2)(C). The Court first noted that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions," *New York v. United States*, 112 S.Ct. at 2421, and that Congress "may not conscript state governments as its agents." *Id.* at 2429. The Court then outlined "the circumstances under which Congress may use the States as implements of regulation" as follows:

> First, under Congress' spending power, "Congress may attach conditions on the receipt of federal funds." ...
>
> Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation....
>
> By either of these two methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply.... Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

Id. at 2420, 2423-24 (citations omitted).

Turning to the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, the Court concluded:

> Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two.... A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," an outcome that has never been understood to lie within the authority confererd upon Congress by the Constitution.

Id. at 2428 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S.264, 288, 101 S.Ct. 2352, 2366, 69 L.Ed.2d 1 (1981)). The Court further held that "[w]here Congress exceeds its authority relative to the States,...the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." *Id.* at 2431.

In the present case, there is no doubt that the Corps, by means of the § 404 permitting process, has used the Levee District as an "implement[] of regulation" in order to ensure petitioners' property remains undeveloped wetlands for purposes of the park protection zone. *Id.* at 2420. Nonetheless, the Louisiana Supreme Court did not find that the Levee District was a victim of an "unconstitutionally coercive regulatory technique[]," *id.* at 2428, such that the Levee District could avoid accountability for the taking of petitioners' property, although the Levee District so alleged and argued.[11] Rather, the Levee District freely chose to exercise the State's reserved power of eminent domain and therefore remains accountable as a separate soverign for the taking which finally and permanently

[11] *See, e.g.*, Trial Court's Reasons For Judgment, p. A-158 ("The West Jefferson Levee District argues that because the only permit offered to it for the project was for Alternate E, it is not responsible for the Landowners' losses").

destroyed all economically beneficial use of petitioners' property.

This conclusion finds further support in the decision of the United States Court of Appeals for the Fifth Circuit in *Adolph v. Federal Emergency Management Agency,* 854 F.2d 732 (5th Cir. 1988). In that case, the plaintiff landowners sued the Federal Emergency Management Agency (FEMA) for takings as a result of flood control ordinances passed by the Plaquemines Parish Commission Council pursuant to FEMA regulations. The plaintiffs argued that because the FEMA regulations required the parish to adopt the ordinances in order to participate in the National Flood Insurance Program (NFIP), therefore FEMA as well as the parish was liable for the alleged takings. The Court first found that "[b]y conditioning the availability of federally-subsidized insurance upon enactment of local flood-plain management ordinances in accordance with federal standards, the NFIP represents a voluntary federal program.' *Id.* at 735. The Court then observed that "communities such as Plaquemines Parish 'weigh the advantages of these federal benefits against the limitations on future development in the communities, which must be done in a safe manner, so that there will be no damage from flooding in the future'...." *Id.* at 736 (quoting *Texas Landowners Rights Ass'n v. Harris,* 453 F.Supp. 1025, 1030 (D.D.C. 1978), *aff'd mem.,* 598 F.2d 311 (D.C.Cir.), *cert. denied,* 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed.2d 184 (1979)). The Court concluded "that the parish was not compelled to participate in the NFIP and that as a result FEMA could not be charged with an unconstitutional taking of property ...." *Id.*

See also Singleton Sheet Metal Works, Inc. v. City of Pueblo, 727 F.Supp. 579 (D.C.Colo. 1989); *De-Tom Enter. v. United States,* 552 F.2d 337 (Ct.Cl. 1977); *Central and Southern Fla. Flood Control Dist. v. Wye River Farms, Inc.,* 297 So.2d 323 (Fla. App. 1974); *Succession of Rovira v. Board of Comm'rs,* 418 So.2d 1382 (La. App. 1982); *Tamulion v. Michigan State Waterways Comm'n,* 212 N.W. 2d 828 (Mich. App. 1973).

Here, the Corps and the Jefferson Parish Council negotiated and entered into a Local Cooperation Agreement pursuant to Section 103(j) of the WRDA, 33 U.S.C. § 2213(j), whereby the Federal government would retroactively indemnify the Parish for most of the compensation which the Parish as well as the Corps anticipated would be awarded to petitioners for the taking of petitioners' property as a result of the Levee District's acceptance of the permit for construction of the levee along Alignment E. In voluntarily entering the agreement, the Levee District necessarily weighed " 'the advantages of these federal benefits against the limitations on future development' " in the community. *Id.* Therefore, as in *Adolph* and consistent with the Tenth Amendment as interpreted by this Court in *New York v. United States, supra*, the Levee District was not compelled to accept the permit for the levee at Alignment E, and the Corps cannot be charged with the taking of petitioners' property resulting therefrom.

Thus, despite the fact that the Levee District's acceptance of the permit for Alignment E finally achieved the Corps' desired result of preserving petitioners' property in its natural state for purposes of the park protection zone, the Tenth Amendment and the principles of federalism embodied in the Constitution mandate the conclusion that the Levee District must be accountable for the payment to petitioners of just compensation to the full extent of their loss as a result of the taking. As the decision of the Louisiana Supreme Court holds otherwise by treating the Levee District as a mere agent or instrumentality of the federal government and thereby impermissibly exonerating the Levee District, this Court should grant the petition for certiorari to review that decision.

C. The Supreme Court of Louisiana Erred As A Matter of Federal Constitutional Law in Failing and Refusing to Consider the Fair Market Value of the Property Based On a Highest and Best Use As Investment Property

Throughout this litigation, all parties and courts have assumed that *either* the Levee District effected the taking *or* the Corps effected the taking. Such an assumption is reasonable considering that until very recently the accepted view of regulatory takings law was that where a regulation deprived a landowner of *less* than all "economically viable use" of property, there was no taking. *See, e.g., MacLeod v. Santa Clara County,* 749 F.2d 541 (9th Cir. 1984)

Then the United States Court of Appeals for the Federal Circuit rendered its decision in *Florida Rock Industries v. United States (Florida Rock IV),* 18 F.3d 1560 (Fed. Cir. 1994). *See also Florida Rock I,* 8 Cl.Ct. 153 (1985); *Florida Rock II,* 791 F.2d 893 (Fed. Cir. 1986); *Florida Rock III,* 21 Cl.Ct. 161 (1990). In *Florida Rock IV,* the Federal Circuit recognized that even *after* a permit denial property might retain substantial value as investment property in a market composed of willing and knowledgeable purchasers. *Florida Rock IV,* 18 F.3d at 1566, and also recognized that a regulation denying *less* than all economically beneficial use of property as a result of a permit denial constitutes a "compensable 'partial taking.' " *Id.* at 1568-70.

The case involves Florida Rock Industries' suit against the federal government alleging the Corps' denial of its § 404 permit was an uncompensated regulatory taking of its land. In determining the after-taking value of the property, the Federal Circuit in *Florida Rock IV,* 18 F.3d at 1566, held that investment or speculation could be considered a highest and best use of the property, reasoning as follows:

> Florida Rock's survey does indicate that most of the buyers in this market did not have extensive knowledge of the provisions of the Clean Water Act and its impact on the development potential of those properties involving wetlands. It is doubtful that any legal conclusions should be

> drawn form this. Such broadbased disregard for current land use regulations suggests that, while parties contract in the shadow of the law, long term market trends in real estate values are not necessarily correlated to Government controls. The Government's appraisers testified that detailed knowledge of regulatory constraints was relevant only when the goal of the purchasers was immediate development....
>
> A speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulations at any given time may not be particularly important to those active in the market.

Id.

Concluding the Claims Court had erred in rejecting the appraisals of the Government's experts who testified that a market for the property existed among knowledgeable investors and that the property's highest and best use would be "investment" with a value of $4000 per acre, the Federal Circuit remanded the case to the Court of Federal Claims with instructions to determine the after-taking value of the land based on such evidence of highest and best use. *Id.* at 1573.

Anticipating a finding on remand that the Corps' denial of Florida Rock's permit resulted in a denial of *less* than all economically beneficial use of the property, the Court observed:

> The question remains, does a partial deprivation resulting from a regulatory imposition, that is, a situation in which a regulation deprives the owner of a substantial part but not essentially all of the economic use or value of the property, constitute a partial taking, and is it

compensable as such?

Id. at 1568. The Court answered the question affirmatively, reasoning as follows:

> Courts have held that even relatively minor physical occupations are compensable. Logically, the amount of just compensation should be proportional to the value of the interest taken as compared to the total value of the property, up to and including total deprivation, whether the taking is by physical occupation for the public to use as a park, or by regulatory imposition to preserve the property as a wetland so that it may be used by the public for ground water recharge and other ecological purposes.
>
> ....
>
> Nothing in the Fifth Amendment limits its protection to only "categorical" regulatory takings, nor has the Supreme Court or this court so held. Thus there remain in cases such as this the difficult task of resolving when a partial loss of economic use of the property has crossed the line from a noncompensable "mere diminution" to a compensable "partial taking."

Id. at 1569-70. The Federal Circuit added that on remand the trial court would "find itself with little direct case law guidance." *Id.* at 1570.

The Federal Circuit rendered its decision in *Florida Rock IV* on March 10, 1994. The Louisiana Supreme Court rendered its decision in this case on May 23, 1994. Thus, prior to the time petitioners applied to the Louisiana Supreme Court for rehearing, the law required petitioners to perpetuate the legal fiction that preliminary regulatory activity could not effect a taking and that the final act in

the regulatory process caused the entire loss suffered throughout that process. Consequently, it would have been inconceivable and pointless for petitioners to allege that the Corps' permit denials effected a partial regulatory taking prior to the expropriation by the District, which expropriation in turn resulted in a separate partial regulatory taking. Now, however, by reconciling takings law with the practical reality that partial takings do occur as a result of the regulatory process, the rule established in *Florida Rock IV* allows courts to abandon the legal fictions which made it so difficult to impose the entire loss on the taking authority that took the final action which reduced a property's value to practically nothing. Accordingly, in support of their application to the Louisiana Supreme Court for rehearing, petitioners argued in the alternative that as a result of the Corps' permit denials, the property's highest and best use at the time of the expropriations was for investment purposes.

Petitioners are not asking this Court to decide whether a partial regulatory taking is compensable under the Fifth Amendment.[12] While that issue is relevant to the merits of petitioners' suit against the Corps in the Court of Federal Claims, it is not relevant here because the Levee District, as the taking authority which took the final action, necessarily destroyed all of the property's value which remained after the permit denial. The question here concerns the proper *measure* of that value, and the Federal Circuit's recognition of the concept of a compensable partial taking is significant to this case because for the first time it enables petitioners to address the practical reality that

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[12] In *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), this Court recognized the concept of a "categorical" taking where a regulation denies *all* economically beneficial use of land, but stopped short of deciding whether a denial of *less* than all economically beneficial use could constitute a "partial" taking.

they suffered not one, but two, takings. Thus, even though the Corps denied peetitioners' permit application in order to preserve wetlands, and even assuming petitioners failed to establish a reasonable probability they could obtain a permit in the reasonably foreseeable future and hence could not prove the highest and best use of the property was development as a residential subdivision, under *Florida Rock IV* petitioners nevertheless can prove the property's highest and best use at the time of the Levee District's expropriations was for investment purposes in a market composed of willing and knowledgeable buyers.

In short, petitioners are asking this Court to grant certiorari in order to determine whether the fair market value of property with a highest and best use as investment property is a proper measure of just compensation under the Takings Clause of the Fifth Amendment. Petitoners believe that under the Fifth Amendment as interpreted by this Court in *Olson v. United States,* 292 U.S. 246, 54 S.Ct. 704, 78 L.Ed. 1236 (1934), they are entitled to an opportunity to prove the fair market value of the property using the assumptions of highest and best use recognized as valid in *Florida Rock IV.* In *Olson,* 292 U.S. at 255, 54 S.Ct. at 708-09, this Court enunciated the "highest and best use doctrine" as follows:

> Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum rquired to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideratin of all the uses for which it is suitable. *The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full*

> *extent that the prospect of demand for such use affects the market value while the property is privately held.*

(Emphasis added.) As the Fifth Amendment entitles petitioners to an opportunity to prove "[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future...to the full extent that the prospect of demand for such use affects the market value while the property is privately held," *id.*, the Louisiana Supreme Court erred as a matter of federal constitutional law in failing and refusing to consider the fair market value of the property at the time of the expropriations based on a highest and best use as investment property.

The opinion of the Louisiana Supreme Court notes that at trial petitioners did not attempt to prove the property's highest and best use was for investment purposes. 93-1718 at 51, 640 So.2d at 1295 (p. A-87). Petitioners did not introduce into evidence appraisals of their land as unpermitted, undevelopable wetlands because as explained *supra*, under then-existing law their burden was to prove the property's highest and best use at the time of the expropriation was development as a residential subdivision. Thus, the Landowners' appraisers conducted no research of comparable sales of unpermitted wetlands, which explains why one of petitioners' experts testified, as the opinion also acknowledges, that "he could not give a value for wetlands property if he had to make the assumption that he did not know whether a permit could be obtained or not." 93-1718 at 52, 640 So.2d at 1296 (p. A-89). Furthermore, the testimony of petitioners' experts on cross examination which the Levee District relied on was in response to hypothetical appraisal assumptions which did not properly reflect the assumptions established in *Florida Rock IV* and which did not accurately reflect the known facts of the in-

stant case. Only expert appraisals using the apropriate assumptions of highest and best use will determine conclusively whether an investment market existed for the Property at the time of the expropriation. As the Court in *Florida Rock IV* observed, absent such evidence "it would be inappropriate for a court to substitute its own judgment of value for that of the market." *Florida Rock IV,* 18 F.3d at 1567.

Under the circumstances of this case, therefore, the fact that the record contains no reliable evidence of fair market value based on a highest and best use as investment property should not deprive petitioners of an opportunity to prove the property had such a fair market value. In his dissent from the denial of rehearing, Chief Justice Calogero pointed out that under Louisiana law, the Court "has both the right and the duty to remand the case for retrial or supplemental hearing when it becomes necessary to introduce additional evidence in order to prevent a miscarriage of justice." 640 So.2d at 1305 (p. A-113) (Calogero, C.J., dissenting from denial of rehearing). Moreover, as the Louisiana Supreme Court erred as a matter of federal constitutional law in failing and refusing to consider the fair market value of the property at a highest and best use as investment property, this Court has jurisdiction to grant certiorari in order to review the Court's decision and to remand this case for further proceedings.

CONCLUSION

The Louisiana Supreme Court committed no less than three errors of federal constitutional law in its decision in this case. The Court erroneously concluded the Corps' denial of petitioners' permit application in 1979 effected the taking of petitioners' property, erroneously exonerated the Levee District of liability for the taking by

treating it as a mere agent or instrumentality of the Corps, and erroneously failed and refused to consider the value of petitioners' property according to its highest and best use as investment property at the time of the expropriations. Each of these errors of federal constitutional law warrants the granting of the petition for certiorari in this case.

Respectfully submitted,

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